IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9173 OF 2004

Smt. Rosy Devis ... Petitioner

Vs.

Ms. Sushila M. Mirajkar & Anr. ... Respondents

Mr. A.S. Khandeparkar for the petitioner.

Mr. Rajesh Datar with Mr. J.M. Puranik for respondent 1.

CORAM: SMT. RANJANA DESAI, J.

DATED: 12TH APRIL, 2005.

P.C.:-

1. The petitioner is original defendant 1. Respondent 1 is the plaintiff and respondent 2 is original defendant 2. The plaintiff filed a suit for eviction on the ground of subletting and acquisition of alternate accommodation. The trial court decreed the suit on the ground of subletting and on the ground of acquisition of suitable alternate accommodation. The lower appellate court confirmed the trial court's order. Hence, this writ petition.

2. I have heard, at considerable length, Mr. Khandeparkar, the learned counsel appearing for the petitioner/defendant 1. Mr. Khandeparkar contended that the agreement for ground rent on which the reliance is placed clearly states that the plaintiff had constructed

the plinth. However, she could not bear the construction cost. Therefore, defendant 1 paid construction cost of Rs.2,750/- to the plaintiff. The ground rent was agreed to be Rs.10/- per month. Defendant 1 was to construct a room and use it for her residence. Inspite of this, in the plaint, the plaintiff stated that she has constructed the room herself. In the written statement, defendant 1 denied this. Thereafter, the plaintiff carried out an amendment and brought on record that the plaintiff had constructed the house upto the plinth and handed it over to defendant 1. Mr. Khandeparkar argued that therefore, the plaintiff has admitted that defendant 1 is the owner of the super structure. In fact, she has admitted the same in the evidence also. The learned counsel contended that since the super structure belongs to defendant 1, he could have sublet the same. He submitted that both the courts have not appreciated this legal submission. In this connection, he relied on the judgment of the Supreme Court in **Mrs. Dossibai N.B. Jeejeebhoy v. Khemchand Gorumal, AIR 1966 SC 1939**, and the judgments of this court in **Sitaram Narayan Shinde & others v. Ibrahim Ismail Rais & others, 2005 (2) Bom.C.R. 427 and in Vinayak Gopal Limaye v. Laxman Kashinath Athavale, AIR 1957 Bom. 94**.

3. As against this, Mr. Datar, the learned counsel appearing for respondent 1 contended that the concurrent finding of fact is unassailable and no interference with the impugned order is called for by this court in its

writ jurisdiction.

4. By amending the plaint, the plaintiff has clarified her case. The plaintiff's case is that she had constructed the plinth. According to her, defendant 1 has constructed the super structure and she has let it out to defendant 2. Defendant 1 is the owner of the super structure but not of the land. The agreement of ground rent which is the basis of the suit clearly indicates that the land belongs to the plaintiff. The plaintiff has constructed the plinth. Defendant 1 has constructed the suit premises. As per the agreement of ground rent, in case of breach of any of the terms and conditions of the agreement, the plaintiff had a right to get back the vacant possession of the plinth after removing the super structure. The agreement further states that if defendant 1 does not require the super structure, the plaintiff could take possession thereof after paying the construction cost to defendant 1 and, it is only if the plaintiff did not want to take possession of the super structure that defendant 1 could sell the super structure to any one and then the plaintiff was to issue the rent receipts in favour of the purchaser. Therefore, about defendant 1's ownership of super structure, there is no dispute. However, in the written statement, defendant 1 has made an attempt to claim the ownership of the land. That claim is false. The agreement of ground rent makes it amply clear.

5. Admittedly, defendant 2 is in possession of the suit premises. This is admitted by defendant 1. However, her case is that defendant 2 is the caretaker. In my opinion, this case must fail because according to defendant 1, defendant 2 was giving her a sum of Rs.350/- per month. A caretaker is not expected to give money to the owner. This amount is, therefore, rent paid by defendant 2 to defendant 1. Therefore, in my opinion, the concurrent finding that defendant 1 has sublet the suit premises cannot be disturbed. This also leads to the conclusion that defendant 1 has, therefore, committed a breach of the agreement by not offering the premises to the plaintiff, if she did not want the premises for her own use. As per the agreement, in case of breach of terms and conditions, the plaintiff can call upon defendant 1 to make her available the plinth by removing the super structure. The trial court and the lower appellate court cannot, therefore, be faulted for having held against defendant 1 on the ground of subletting.

6. In my opinion, **Sitaram's case (supra)** is clearly not applicable to the facts of this case. In that case, this court was considering a case where the suit was filed for possession, the land belonged to one person and the super structure belonged to another. This court observed that where the land belongs to one person and the super structure belongs to another and the owner of the super structure lets out the super structure, in the absence of any other evidence, it cannot be held that the owner of

the super structure has sublet the land. In that case, it was the case of the plaintiff that defendant 1 had sublet the land. Hence, **Sitaram's case (supra)** is clearly not applicable to the facts of this case.

7. So far as **Vinayak's case (supra)** is concerned, it recognises the concept of dual ownership. There can be no dispute about this concept. So far as the judgment in **Mrs. Dossibai's case (supra)** is concerned, in that case, it is held that when lessee constructs a building on open land, bar of section 15 of the Rent Act will operate only in the way of letting out the land of which lease had been taken, but will not stand in the way of the building constructed on the land. This proposition also cannot be disputed. However, in this case, the plaintiff's contention is that defendant 1 has committed breach of the agreement by not offering the premises to the plaintiff as per the agreement of ground rent. Hence, **Vinayak's case** and **Mrs. Dossibai's case (supra)** will have no application to the facts of the present case.

8. As regards suitable alternate accommodation also, there is concurrent finding of fact against defendant 1. Defendant 1 has admitted that her husband has taken premises in Pushapanjali building on rental basis and she is staying there after 18/10/1990. Daughter of defendant 1 has admitted that defendant 1 is not residing in the suit premises and she is staying with her son at Kalyan. Therefore, the plaintiff has clearly made out a case

under section 13(1)(h) of the Rent Act. In view of this,

I find no merit in the petition. Petition is dismissed.

9. At this stage, Mr. Khandeparkar, the learned counsel appearing for the petitioner says that the operation of the impugned decree may be stayed for eight weeks. Mr. Datar, the learned counsel for the respondents objects. In the facts and circumstances of the case, the impugned decree is stayed for eight weeks on the condition that defendant 1 and all adult members of her family filing usual undertakings in this court to the effect that they will not sell, assign, and transfer the suit premises or alienate, encumber or create any third party rights in the suit premises or induct anyone in the suit premises during the period of eight weeks and in case the petitioner is unable to get any favourable order from the Supreme Court within eight weeks, she shall hand over vacant, peaceful and unencumbered possession of the suit premises to the petitioner after eight weeks.

(SMT. RANJANA DESAI, J.)